

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PAN AMERICAN GRAIN CO., INC., and PAN
AMERICAN GRAIN MANUFACTURING CO., INC.

and

Case No. 24-CA-9885

CONGRESO DE UNIONES INDUSTRIALES
DE PUERTO RICO

Jose L. Ortiz, Esq., for the General Counsel.
Ruperto J. Robles, Esq., for the Respondent.

DECISION

Statement of the Case

GEORGE ALEMÁN, Administrative Law Judge. This case was tried on December 15, 2004, in San Juan, Puerto Rico. The complaint in this matter was issued on September 20,¹ by the Regional Director for Region 24 of the National Labor Relations Board (the Board) alleging that Pan American Grain Co., Inc. and Pan American Grain Manufacturing Co., Inc., (jointly referred to herein as the Respondent), has violated Section 8(a)(1) of the National Labor Relations Act (the Act) by continuing to maintain in its employee manual an overly broad distribution rule prohibiting employees from distributing any type of literature without prior authorization. The Respondent admits having such a rule but denies that the rule violates the Act.²

The parties were afforded full opportunity to appear at the hearing, to introduce relevant evidence, to examine and cross-examine witnesses, and to file post-hearing briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering briefs filed by the General Counsel and the Respondent, I make the following

¹ The unfair labor practice charge giving rise to the complaint was filed by Congreso de Uniones Industriales de Puerto Rico (the Union) on June 8, 2004.

² The parties stipulated that the rule has in fact been maintained by the Respondent in an employee manual since around December 1997. The parties further stipulated that the distribution rule carries sanctions which might be imposed for a violation of the rule, ranging from a simple warning for a first offense, a suspension for a second offense, and discharge for a third offense.

Findings of Fact

I. Jurisdiction

The Respondent, a Puerto Rico corporation with its principal office located in Guaynabo, Puerto Rico, and other facilities located in Guaynabo and Bayamon, Puerto Rico, is engaged in the importation, manufacture, and sale of grains, animal feed and related products, and in the processing of rice. During the 12-month period preceding issuance of the complaint, the Respondent, in the course and conduct of its business operations, purchased and received at its above facilities goods valued in excess of \$50,000 directly from points outside the Commonwealth of Puerto Rico.³ The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.⁴

II. Alleged Unfair Labor Practices

A. The issue

It is undisputed that since on or around December 1997, and continuing to date, the Respondent has had a rule in its employee manual prohibiting the “[distribution] among employees [of] written material of any type, not authorized by the Plant Manager or the Human Resources Director in accordance with Company policy.” The sole issue before me is whether the rule violates Section 8(a)(1) of the Act.

The General Counsel contends that the rule is on its face overly broad and thus unlawful. The Respondent counters that the rule has never been enforced, that the Union waived its right in 1997 to contest the validity of the distribution rule by not objecting to its implementation of the employee manual containing the rule, and that the allegation is, in any event, barred under Section 10(b).

³ The complaint alleges that Pan American Grain Co., Inc. and Pan American Grain Manufacturing Co., Inc. constitute a single-integrated business enterprise. The Respondent neither admits nor denies this allegation. It does, however, admit that Pan American Grain Co., Inc. and Pan American Grain Manufacturing Co., Inc. have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; that they have formulated and administered a common labor policy affecting employees of its operations; that they have shared common premises and facilities and have interchanged personnel with each other, and that they have held themselves out to the public as a single integrated business enterprise. On these admitted facts, I find that Pan American Grain Co. and Pan American Grain Manufacturing Co. constitute a single integrated enterprise and a single employer within the meaning of the Act. Judicial notice is taken of the fact that the Board has, in prior decisions involving this same Respondent, found both companies to be a single-integrated business enterprise nature. See, *Pan American Grain Co.*, 343 NLRB No. 47 (2004) and *Pan American Grain Co.*, 343 NLRB No. 32 (2004).

⁴ Although the Respondent neither admits nor denies that the Union is a Section 2(5) labor organization, the evidence of record makes clear the Respondent and the Union have had an ongoing collective bargaining relationship since the mid-1980's and has, in fact, entered into collective bargaining agreements with the Union. These facts support a finding that the Union is indeed a labor organization under Section 2(5). Also, see the prior Board decisions involving this Respondent cited in fn. 4 above wherein the Union was found to be a Section 2(5) labor organization.

B. Facts

Very little evidence was produced at the hearing regarding this matter. Counsel for the General Counsel rested his case in chief without calling any witnesses. He did, however, call the Union's president, Jose Alberto Figueroa, as a rebuttal witness. The Respondent called its Human Resources Director (herein HRD), Luis Juarbe Santiago, as its principal and sole witness.

The facts show that the Respondent and the Union have had an ongoing collective bargaining relationship since around 1986. HRD Juarbe was hired by the Respondent in August 1999. His predecessor in that position was one Maria Roman Santos. In apparent support of its waiver defense, the Respondent, through Juarbe, produced a letter, purportedly written and sent to Figueroa by Ms. Roman on May 15, 1997, notifying him that, pursuant to the management rights clause in the parties' then collective bargaining agreement,⁵ copies of an employee manual that was to be implemented on June 1, 1997, were to be distributed to all employees, and that, should the Union wish to discuss any matter relating to the manual's contents, it should notify her at the Union's earliest convenience. (RX-6).⁶ Juarbe did not have first-hand knowledge of what transpired between Roman and the Union and/or Figueroa as he was not yet employed by the Respondent. As to Roman's May 15, 1997, Juarbe testified that he found in a folder where all correspondence exchanged between the Respondent and the Union in 1997 were kept. Juarbe claimed that no other documents relating to this matter, including any reply by the Union to Roman's letter, were found in the folder, and that he did not know what happened as a result of Roman's letter.

Juarbe testified that since becoming Human Resources director, he has been involved in approximately 300 arbitration cases with the Union and that, in almost all those cases, the employee manual has been used by both the Union and the Company as evidence. He contends that the Union has never asked or demanded that the no-distribution rule be rescinded, revoked, or deleted from the employee manual. He further claims to have personally observed employees distributing literature or other documents on "company time and premises" and that, since August 1999 when he first began with the Company, no employee has ever been warned or disciplined for engaging in such activity.

On cross-examination, Juarbe admitted that he did not know if the employee manual referenced in Roman's May 15, 1997, letter, or the no-distribution rule at issue here, had been the subject of negotiations which gave rise to the collective bargaining that expired in 1996, and that neither the manual nor the disputed rule have been the subject of contract negotiations during the time he has been employed by the Respondent.

Figueroa, on rebuttal, admitted receiving Roman's May 15, 1997, letter along with the employee manual referenced therein, but claims that he had indeed responded to Roman's letter in writing advising the Respondent that the Union was opposed to the unilateral implementation of the employee manual.⁷ He contends that despite the Union's stated

⁵ According to Roman's letter, the parties' most recent agreement expired on November 21, 1996.

⁶ Roman's letter, written in Spanish, was duly translated by the interpreter at the hearing (Tr. 30-31).

⁷ Figueroa's letter was not produced at the hearing. He contends that he has the letter but that it was not brought to the hearing because he was advised by his attorney that he did not need to bring anything. He did, however, offer to produce it if asked to do so.

opposition to the manual, the Respondent nevertheless put the manual into effect, prompting the Union to file a charge with the Board. Finally, Figueroa testified that the employee manual has been part of the parties' ongoing negotiations for a new contract since 2000.

3. Discussion

Addressing the validity of the Respondent's no-distribution rule, the Board has long maintained that a rule prohibiting the distribution of literature on employees' own time and in nonworking areas is presumptively invalid. *Our Way, Inc.*, 268 NLRB 394 (1983); *Stoddard-Quirk Mfg.*, 138 MLRB 615 (1962); also, *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001). It has also held that "any distribution rule that requires employees to secure permission from their employer prior to engaging in protected concerted activities on an employee's free time and in nonworking areas is unlawful. *Teletech Holdings*, supra; *Brunswick Corp.*, 282 NLRB 794, 795 (1987). The Respondent's rule does precisely that. Thus, the rule, on its face, prohibits the distribution of all literature, regardless of whether it is to be done by employees on own time and in nonworking areas, without the plant manager's or HRD's prior approval. Employees wishing to distribute, for example, union literature on their own free time in nonworking areas could, therefore, reasonably conclude from a plain reading of the rule that they would need their Employer's permission in order to exercise their Section 7 right in this regard. Consequently, the rule as written in the employee manual is overly broad and presumptively invalid as it places an unlawful "prior approval" requirement on the employees' free exercise of their Section 7 right to distribute literature on their own time and in nonworking areas.

When a rule is found to be presumptively unlawful, the employer bears the burden of showing that it communicated or applied the rule in a way that conveyed a clear intent to permit the distribution of literature during the employees' free time in nonworking areas. *Ichikoh Mfg.*, 312 NLRB 1022 (1993), enfd. 41 F.3d 1507 (6th Cir. 1994); also, *Our Way*, supra at 395, fn. 6 and *Trus Joist Macmillan*, 341 NLRB No. 45 (2004). The Respondent here has produced no evidence to show, nor for that matter has it claimed, that it communicated or, in some other fashion, conveyed to employees that the prior approval requirement in its distribution rule did not apply to the employees' distribution of literature on their own free time in nonworking areas. The fact that some employees may have ignored the rule in the past and not been disciplined for it, as claimed by Juarbe, does not satisfy the Respondent's burden of establishing that it conveyed to employees its intent to allow them to distribute literature on their own free time in nonworking areas without first having to obtain permission. *Ichikoh Mfg*, supra; also, *Superior Emerald Park Landfill, LLC*, 340 NLRB No. 54, slip op. at 8 (2003); *Cardinal Home Products*, 338 NLRB 1004, 1006 (2003). Accordingly, I find that the Respondent has not met its burden in this case, and that the rule as written and maintained is overly broad and unlawful.

I further find no merit to the Respondent's claim that the Union's alleged failure in 1997, to object to the its implementation of the employee manual amounted to a waiver of the Union's right to thereafter challenge the validity of the solicitation rule contained in the manual. Thus, contrary to the Respondent's assertion at the hearing and on brief, there is no evidence that the Union ever agreed to the 1997 implementation of the employee manual, much less to the distribution rule itself. While the evidence does show that in 1997, the Respondent, through Roman, advised the Union of its intent to implement the employee manual, Figueroa, as noted, testified, without contradiction, that he, in fact, responded to Roman's 1997 letter, in writing, objecting to implementation of the employee manual. He further claimed to still have a copy of the letter, although he did not bring it him to the hearing, which he offered to produce if

requested to do so.⁸ Neither side, however, requested its production.

I credit Figueroa's claim and find that the Union, through Figueroa, did indeed object, in writing, to the Respondent's 1997 decision to implement the employee manual. The only evidence produced by the Respondent to counter Figueroa's claim in this regard is Juarbe's testimony that he found no such letter from the Union in the folder kept by the Respondent containing all 1997 correspondence to and from the Union. However, as Juarbe began his employment with the Respondent in August 1999, more than two years after the Roman letter was sent, he clearly was not privy to what had transpired between the parties in 1997, and clearly could not have known if the Respondent ever received such a response from the Union to Roman's letter. Moreover, there are any number of reasons to explain why no copy of the Union's letter was found in the Respondent's own correspondence folder. The Union's 1997 letter to Roman, for example, could very well have been misfiled, misplaced, lost, or accidentally discarded by Roman or someone else. Finally, the Respondent could easily have challenged Figueroa's claim that he responded to Roman's 1997, letter objecting to the employee manual by taking him up on his offer to produce the Union's response letter. Had Figueroa not been able to produce the letter after claiming to have retained a copy, his credibility would have been seriously undermined. The Respondent's failure to make such a request of him leads me to believe that the Respondent, in fact, knew that the Union had objected to the 1997 implementation of the employee manual, as claimed by Figueroa. In sum, the Respondent's claim that the Union somehow waived its right to challenge the implementation or validity of the distribution rule contained in the employee manual lacks evidentiary support and is without merit.

Nor do I agree with the Respondent's claim that the complaint allegation is time-barred under Section 10(b) because the distribution rule has been in existence since at least 1997, and presumably never enforced. While it appears to be the case that the disputed solicitation rule was promulgated in or before 1997, well outside Section 10(b)'s six-month limitation period, it is not the actual promulgation of the rule that is being challenged here, but rather its continued maintenance by the Respondent in its employee manual. The Board has held that Section 10(b) does not bar the filing of a charge alleging as unlawful the continued maintenance of a facially invalid and presumptively unlawful rule, notwithstanding that its promulgation may have occurred outside the 10(b) period. *Control Services*, 305 NLRB 435, 442 (1991); *Alamo Cement*, 277 NLRB 1031, 1037 (1985). Thus, even if not enforced, the mere maintenance of an overly broad distribution rule, the Board has stated, remains unlawful because it tends to chill employees in the exercise of their Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75, slip op. at 10 (2004); *Cardinal Home Products*, 338 NLRB 1004, 1006 (2003); *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 349 (2000). Accordingly, the Respondent's assertion that the complaint allegation is barred by Section 10(b) is rejected as without merit. To find otherwise would be to grant the Respondent a license to interfere with protected employee rights.

In sum, I find that the Respondent's continued maintenance of its overly broad and facially invalid distribution rule in the employee manual violates Section 8(a)(1) of the Act as alleged.

⁸ When asked by the Respondent's counsel why he did not bring a copy of the letter with him to the hearing, Figueroa credibly explained that he did not do so because he had been advised by his attorney that he did not need to bring anything with him to the hearing.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), and Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining an overly broad no-distribution rule that requires employees wishing to distribute literature during their nonworking time in nonworking areas to first obtain permission from its plant manager or Human Resources director, the Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1), and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent shall be required to rescind its unlawful no-distribution rule, and to notify employees in writing of its rescission. See, *Ingram Book, Inc.*, 315 NLRB 515, 516 (1994). The Respondent shall also be required to post an appropriate notice to employees in English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Pan American Grain Co., Inc. and Pan American Grain Manufacturing Co., Inc., Guaynabo, PR, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining an overly-broad distribution rule.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Amend its employee handbook by rescinding the unlawful overly broad rule on the distribution of literature, and notify employees in writing that this has been done and that rule is no longer in effect.

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Within 14 days after service by the Region, post at its facilities in Guaynabo and Bayamon, P.R., in English and Spanish, copies of the attached Notice marked "Appendix."¹⁰ Copies of the Notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since June 8, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

George Alemán
Administrative Law Judge

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain an unlawfully broad distribution policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL amend our employee handbook by rescinding the unlawful overly broad rule regarding the distribution of literature, **WE WILL** and notify you in writing that this has been done and that the rule is no longer in effect.

PAN AMERICAN GRAIN CO., INC. and
PAN AMERICAN GRAIN MANUFACTURING INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

525 F. D. Roosevelt Avenue, La Torre de Plaza, Suite 1002, San Juan, PR 00918-1002

(787) 766-5347, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (787) 766-5377.